St. Jude Industrial Park Board *and* George Childers. Case 14-CA-14754

December 2, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 21, 1982, Administrative Law Judge Wallace H. Nations issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge: On February 27, 1981, George Childers, an individual, filed a charge alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (herein called the Act), against the city of New Madrid, St. Jude Industrial Park, and Noranda Aluminum, Inc. His July 20, 1981, amended charge alleged violations of Section 8(a)(1), (3), and (4) of the Act against only the St. Jude Industrial Park Board. After proper notice and an answer by Respondent, a hearing was held in Sikeston, Missouri, on September 21, 22, and 23, 1981.

The bulk of the evidence adduced at the hearing concerned whether the National Labor Relations Board (Board) has jurisdiction over Respondent. There are three jurisdictional issues: (1) whether jurisdiction over Respondent is precluded because of Section 2(2) of the Act excluding political subdivisions of the States from the Board's jurisdiction; (2) whether the Board should utilize its Section 14(c)(1) power to refrain from exercising jurisdiction because Respondent is a contractor with a political subdivision; and (3) whether the Charging Party's alleged status as a Section 2(11) supervisor deprives the Board of jurisdiction. As will be explained subsequently, the answer to the first two issues is that the Board has jurisdiction and should not refrain from exercising the same. As to the third issue, I find that the Board has jurisdiction to consider the 8(a)(1) and (4) violation allegations. It does not have jurisdiction to consider the 8(a)(3) violation and I will recommend that it be dismissed.

Upon the entire record, the briefs,[1] and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. BUSINESS OF RESPONDENT

Respondent is an unincorporated entity that is in the business of promoting industrial development within the city of New Madrid. During the year 1980, a representative year, Respondent directly purchased from suppliers outside the State of Missouri goods, materials, and supplies in value exceeding $50,000.

II. SECTION 2(2) JURISDICTION

The city of New Madrid, Missouri, is classified as a fourth-class city based on its population. Prior to 1969, the city purchased a tract of land within a short distance of its boundaries consisting of 4,070 acres. These 4,070 acres came to be known as St. Jude Industrial Park. The total cost to the city for the acreage was $7.9 million. The Economic Development Administration, a department of the Federal Government, granted the city $2.8 million and the balance of the funds they needed to develop the tract was supplied by funds obtained from an $85-million-industrial bond issue with Noranda Aluminum (Noranda) as the guarantor of the bond and a $98-million-power plant revenue bond issue with Associated Electric as the guarantor. Noranda purchased 17.443 acres of the tract upon which it constructed its aluminum plant. Also, at the time of the hearing, Noranda had under construction a facility covering 27.556 acres and an option to purchase an additional 1,500 acres. Associated Electric purchased 100 acres.

The revenue bonds guaranteed by Noranda will expire in 1993. At that time Noranda will have the option of purchasing the part at the price of $10 along with any other money that is outstanding in the bond fund and subject to trustee fees and expenses. Although Noranda does not have title to the land at this time, it is paying the annual payments for the bonds and thereby, in effect, paying for the land.

On November 2, 1970, New Madrid and Noranda entered into a declaration creating the St. Jude Industrial

[1] On November 25, 1981, Respondent's counsel wrote a letter alleging serious misrepresentations of both record evidence and precedent. Also contained in that letter were arguments attempting to disprove these alleged misrepresentations. On December 1, 1981, the General Counsel filed a motion in opposition to Respondent's supplemental brief. This motion did not contain a motion to strike the letter but merely requested that I do not consider the arguments it contained. Also contained in the motion was an attempt at rebutting each of Respondent's allegations. On December 2, 1981, Respondent's counsel sent a second letter which attempted to rebut the General Counsel's legal theories. Pursuant to the Board's Rules and Regulations and Statements of Procedures, Series 8, as amended, the General Counsel's motion that I not consider the arguments contained in Respondent's letter is hereby granted.

Park. The declaration provides that the city of New Madrid and Noranda are engaged in developing the St. Jude Industrial Park for the creation and maintenance of an industrial community. Their declaration defines the meaning of certain terms and states that management of the Park will be under the control of the St. Jude Park Board and said board will be composed of six persons, three persons appointed by the city and three members appointed by Noranda, one of them will be park manager. The manager of the Park board is selected from the staff of Noranda.

Section 2(2) of the Act defines which employers are within its jurisdiction. Among the exempt employers are state governments and "political sub-divisions thereof." 29 U.S.C. § 152 2(2) (1976). Prior to *National Transportation Service, Inc.*, 240 NLRB 565 (1977), the Board viewed this exception as covering both political subdivisions and, in certain circumstances, its contractors (when the subdivision retained control over the contractor's labor relations or when the contractor's service was intimately connected with the subdivisions' governmental functions). However, in *National Transportation Service*, the Board announced a new two-stage analysis: The Board would determine whether the respondent was an employer under Section 2(2), then determine whether the employer had sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative. Under the Board's Section 2(2) analysis only state and political subdivisions would be exempt employers, with the "control" analysis being utilized to determine whether to exercise jurisdiction over contractors doing business with a political subdivision. Respondent maintains that it is a political subdivision of New Madrid. In *N.L.R.B.* v. *Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604–605 (1971), the Court articulated the following as its understanding of the Board's policy towards determining whether an institution is a political subdivision under Section 2(2): ". . . the Board . . . has limited the exemption for political subdivisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." Because the Court held that the Board was misapplying the second test, it did not discuss the policy's merits as a statutory construction of Section 2(2). *Id.* at 605. In this case a utility district was incorporated by Hawkins County residents pursuant to Tennessee Authorizing Legislation. Because the district commissioners were appointed by an elected official and were subject to statutory removal procedures applicable to all Tennessee public officials, the Court held that the district satisfied the requirements of the second test and was thus exempt. Recently, the Board affirmed that policy. *The New York Institute for the Education for the Blind*, 254 NLRB 664 (1981). The Board found that the Institute satisfied the first test because it was created by state legislature, for almost 150 years was denominated by the same as its agent in satisfying the State's perceived obligation to provide an education to blind residents, and the commissioner of education had the power to the Institute.

The General Counsel argues that Respondent fails to satisfy the first test by alleging that the city of New Madrid did not have the power to create the Park board, and by interpretating *Utilities District* to preclude entities created by political subdivisions rather than by the State from satisfying the requirements of the first test. I cannot agree. At the hearing a stipulation was made recognizing that Mo. Rev. Stat. ch. 100 (1978),[2] impowered the city of New Madrid "to engage in industrial projects." This chapter also authorized cities to lease to corporations any facilities purchased for industrial development and to issue revenue bonds to finance these projects provided that the bond repayment be an obligation of the project rather than the city. The law also requires that the revenue bonds be approved through a voter referendum and that all industrial projects must be approved by the city's governing body and the state commerce and industrial development division. Section 100.010(5) includes the term "industrial plants" within the definition of industrial development projects. The General Counsel maintains that the absence of a provision expressly authorizing the city to create an industrial park means that such a park is not considered an industrial project. The General Counsel further argues that if the industrial park was not enacted pursuant to Mo. Rev. Stat. ch. 100 (1978), then the city did not have the power to create it, and, therefore, the Park board cannot be a political subdivision. However, since an industrial park is basically a configuration of industrial plants, the General Counsel's premise that the statute permits industrial plants while excluding industrial parks is ill-founded. Thus, it is unnecessary to decide whether an entity created in an *ultra-vires* manner can satisfy the first *Utilities District* test.

According to the General Counsel's interpretation of *Utilities District*, political subdivisions created by cities, counties, or townships would be excluded from utilizing the first test. Neither Tennessee nor Hawkins County created the utilities district, it was the creation of private residents and thus did not call within the first test. Therefore, the facts in *Utilities District*, do not support the holding the General Counsel would urge. The General Counsel also relies on *Randolph Electric Membership Corporation*, 145 NLRB 158 (1963), enfd. 343 F.2d 60 (4th Cir. 1965), where the Board asserted jurisdiction over two nonprofit membership utility corporations. These were incorporated by "natural persons" rather than by the State of North Carolina or any of its counties. Thus, the Board was not presented with a problem of a city-created entity when it held that these corporations did not satisfy the first test. In *Camden-Clark Memorial Hospital*, 221 NLRB 945 (1975), the Board held that a hospital created by the city of Parkersburg, West Virginia, satisfied the first test and thus did not assert jurisdiction over it. In *Association for the Developmentally Disabled*, 231 NLRB 784 (1977), the Board reached a similar result and did not assert jurisdiction over an agency created by Franklin County. Thus, the General Counsel's argument that the city of New Madrid is in-

[2] Counsel for Respondent made a representation that chapter 100 as cited in the revised statutes of Missouri 1978, is the same as when the St. Jude Industrial Park was created.

capable of creating a political subdivision according to the requirements of the first test is not acceptable.

The issue still remains as to whether the industrial park was created by New Madrid, "so as to constitute a department or administrative arm of the government." The Board has relied on a combination of factors in making a determination as to whether an entity constitutes a governmental department. In many of the cases, the Board will consider an entity to so constitute a department when, as in this case, the government owns the facilities that the entity utilizes. Noranda (the Park's primary tenant) has the option to purchase the entire park at the end of the lease. To purchase the land that it presentlv occupies it will pay $10, thus as the city attorney testified, "Noranda, in paying the annual payment of this bond, is in effect, paying for the land even though their title did not say so." If Noranda wishes to purchase the remaining acreage the purchase price is $4 million. In *Morristown Hamblen Hospital Association*, 226 NLRB 76 (1976), the Board held that it had jurisdiction even though Hamblen County possessed the title to the hospital site. Although *Morristown*, is distinguishable from the present case in that the State did not create the hospital, the rationale that the county's arrangement with the hospital indicated an intent by Hamblen County not to create an arm of the government is applicable. The first factor relied on by the Board was that Hamblen County did not retain any formal authority over the hospital's budget. Here, the St. Jude Industrial Park Board declaration which established the Park does not prescribe a process by which the Park board creates or approves its budget. The only fiscal restraint on the Park is that the cost of the Industrial Park cannot become either a tax burden or a burden on the general revenues of the city.[9] The second factor relied on in *Morristown*, is that none of the hospital's board of trustees were subject to confirmation or control by the county. The declaration involved in the instant case provides that Noranda select the park manager who serves as one of three Noranda appointees on the Park board. New Madrid appoints the other three board members. Respondent maintains that, since the city has the power to revoke the ordinance approving the declaration, it has retained the power to control the Board's composition. The issue is not the city's potential power, but that the city's agreement to a declaration whereby it appoints only half of the board members indicates that it did not intend the board to be an administrative or departmental arm of New Madrid.

In *Northhampton Center for Children and Families*, 257 NLRB 870 (1980), although the entity was a private nonprofit corporation, the Board held that it did not have jurisdiction because extensive state control over its operations indicated that it was created to constitute a departmental arm. As in *Morristown*, the entity operated with state-owned facilities. But, unlike *Morristown*, the State retained extensive control over the Center's budgetary process; the State audited all of its financial records and had line item approval of the budget. Additionally, the State has considerable policy control over the Center: (1) the State prescribes which individuals are eligible to be clients; (2) the State requires the Center to develop specific policies towards its clients; (3) the State monitors all of the Center's activities; and (4) the State must approve the appointment of the Center's executive director. New Madrid does not exercise any comparable policy or budgetary control over the Park's operations. The only continuing interaction between the city and the Park is that Park employees are included on the city's payroll and that all expenses incurred by the city because of the Park, including payroll expenses, are reimbursed by the Park's tenants. Therefore, New Madrid's interaction with the Park board indicates that it did not intend the Park board to be either an administrative or departmental arm of the State.

The Park board also does not satisfy the second *Utilities District* test ("administered by individuals who are responsible to public officials or to the general electorate"). While in *Utilities District*, all of the district commissioners were appointed by an elected county judge and were subject to statutory procedures for removing public officials from office for misfeasance or nonfeasance, New Madrid has no control over half of the Park board members. Under the present arrangement neither nonfeasance nor misfeasance would be grounds for removal for the Noranda-appointed Park board members. Respondent cites Mo. Rev. Stat. § 79.240 (1978), as giving the city the power to remove Noranda's appointees to the Park board; however, the question of whether this statutory section gives the city this removal power is best understood when read in context of the proceeding section. Mo. Rev. Stat. §79.230 (1978), which is entitled "appointed officers," provides the mayor (subject to the city counsel's approval) the power to appoint a treasurer, city attorney, city assessor, street commissioner, night watchman, "and other such officers as he may be authorized by ordinance to appoint." Mo. Rev. Stat. § 79.240 (1978), provides various means by which the city may "remove from office any appointed officer of the City at will." Since the ordinance authorizing the mayor to sign the St. Jude Industrial Park declaration permits the city to appoint only half of the Park board, then Mo. Rev. Stat. § 379.240 (1978), only authorized the City to remove these appointees. Thus New Madrid has no removal power over the Noranda appointees comparable to the powers found in *Utilities District*.

Since the Park board was neither "created directly by the state, so as to constitute department or administrative arms of the government, nor administered by individuals who are responsible to public officials or to the general electorate" the Board has the authority to assert jurisdiction over Respondent.

III. SECTION 14(C)(1) DISCRETIONARY JURISDICTION

Having found that the Board has the Section 2(2) authority to assert jurisdiction, the question remains whether the Board should exercise discretionary power to refrain from exercising jurisdiction under Section 14(c)(1), 29 U.S.C. § 164(c)(1) (1976). In *National Transportation Service, Inc., supra*, the Board announced that when the state or political subdivision retained control over labor relations entities with whom it contracted business then

[9] Jt. Exh. 1.

the Board would utilize its discretionary power and refrain from exercising jurisdiction. Therein the Board held that the involved *Bus* company retained sufficient control over its employment. Specifically noting that the Atlanta school district did not exercise "appreciable control" over the company's supervision, discipline, conferring of benefits, hiring, or firing (*Id.* at 565). The rationale of the "right to control" test is that the Act does not force employers to participate in collective bargaining when they do not have the power either to sign or execute employment contracts. *N.L.R.B.* v. *Pope Maintenance Corporation*, 573 F.2d 898 (5th Cir. 1978), enfg. 228 NLRB 326 (1977). In this case, jurisdiction was exercised over *Pope Maintenance Corporation*, since neither the SBA nor the Air Force imposed limitations on Pope's ability to bargain with its employees. Although the Government required Pope to pay its employees a specified minimum, it did not place a ceiling on the maximum pay. In addition, 20 percent of Pope's work for the Air Force was negotiated on a job-by-job basis, thus giving the company greater flexibility and a cost-plus-fixed-fee contract. Furthermore, seniority, plans, merit pay increases, and retirement plans were also within Pope's control.

Respondent's employees receive their paycheck from the city payroll. New Madrid's City Employee Health and Welfare Workers Compensation and Retirement Programs cover Respondent's employees. However, Respondent's tenants reimburse the city for funds spent on these programs. City employees' wages are somewhat lower for similar jobs than those of the Park employees. Prospective Park employees are interviewed by Noranda employees through a consulting arrangement. The Park board directs and controls the work of the people from day to day with Casey Forbes' the former Park superintendent. The contract allows Forbes' control over employee supervision, hiring, and firing. Also, according to the contract, one of the Noranda board appointees, rather than a city employee, is the person to whom Forbes reports. Thus, New Madrid is not exercising any appreciable control over the Park's supervision, discipline, grievance procedure, seniority, hiring, or firing. Additionally, since the city is reimbursed for the Park employees' wages and since the city employees and the Park employees have different wage rates, it can be inferred that the city does not exercise appreciable control over the Park employees wage rates. The question remains whether the Park employees' participation in the City Health and Welfare Workmen's Compensation and Retirement Program is sufficiently controlled by the city so as to counter the aforementioned factors. In *Pope Maintenance Corporation*, the Fifth Circuit noted that minimum standards imposed by the Federal Government upon a contract regarding holidays, vacations, benefits, and wages did not preclude the company from conferring benefits above the minimum. Likewise, the Park is not precluded from offering its employees health and welfare and retirement benefits beyond what is included in the city package. Therefore, the Board should not refrain from exercising jurisdiction over Respondent.

A. *Childers Supervisory Status*

Respondent has shown the Charging Party, George Childers, was a supervisor. Under cross-examination, when questioned about statements in an affidavit, Childers admitted to the existence of facts which supports such a finding. Where discrepancies exist between his direct examination and cross-examination, I credit the latter. When Forbes was not present, Childers was designated as being in charge. Part of his responsibilities included overseeing the other operators. In his affidavit he stated, "My job duties are that I am in charge of the other operators. I see that the plant runs right and that the other operators do their job." He also said, "I would generally give out job assignments to the operators on a day-to-day basis. It would be necessary to tell the operators what needed to be done either by a written work order or a verbal work order." Although Childers did not have the authority to hire, fire, or discipline employees, he did effectively recommend to Forbes that an employee be disciplined. *S. L. Industries, Inc.*, 252 NLRB 1058 (1980) (hourly paid "Lead Lady" held by the Board to be a supervisor because the employee directed her coworkers' work and her recommendations regarding retention of probationary employees were adhered to by the employer).

Although the Act, in Section 2(3), excludes supervisors from coverage, it is present Board law to assert jurisdiction over cases where the charging party alleges that the employer committed an 8(a)(4) unfair labor practice against someone found to be a supervisor. *General Services*, 229 NLRB 940 (1977), enforcement denied 575 F.2d 298 (5th Cir. 1978). *Hi-Craft Clothing Co.*, 251 NLRB 1310 (1980), enforcement denied 660 F.2d 910 (3d Cir. 1981). Because dismissal of the case for lack of jurisdiction due to Childer's supervisory status means in essence that even if Childer's allegations are true the Board is powerless to hear the case, for the limited purpose of discussing this jurisdiction issue, I am assuming the validity of his allegations. He has alleged that he was present at the representation hearing concerning the Park board's employees because the union representative had asked him to testify. The case was settled so Childers did not have the opportunity to testify. Childers was discharged 10 days later. This discharge was allegedly due to Childers' presence at the hearing and because Childers had signed a prounion letter. In *General Services*, the Board held that the employer committed an 8(a)(4) violation when it refused to rehire its supervisor, despite earlier assurances to the contrary, when it discovered that the supervisor filed an unfair labor practice charge with the Board. The Board reasoned that Section 8(a)(4) provided immunity to those who initiated or assisted the Board proceeding and such immunity was necessary to gain access to it. Additionally, the Board reasoned that since the supervisor had filed a charge with it, and since his supervisory status was in question, failure to hold the subsequent refusal to rehire as an 8(a)(4) violation would allow the employer rather than the Board to determine whether the charging party was a supervisor. The Board noted that it did not distinguish between supervisors who cooperated willingly and those who did so by subpoena.

In *Hi-Craft Clothing Company*, the Board reached a similar result, it asserted jurisdiction and found an 8(a)(4) violation when an employer discharged its supervisor when he threatened to go the the "Labor Board" concerning a pay dispute. The Board reasoned that supervisors should be protected when invoking or seeking to invoke the Board's processes. Additionally, it believed nonsupervisory employees would be coerced upon discovering that a supervisor was discharged for seeking relief. In this case, because only a handful of employees work with Childers, the reasons for his discharge would be known by these employees. The Third Circuit, in failing to uphold this decision, contrasted the situation where a supervisor is discharged for seeking the Board's assistance for himself and where a supervisor testifies adversely to the employer's interest. In the latter situation, the court noted that employee rights are affected. The court cited *Oil City Brass Works* v. *N.L.R.B.*, 357 F.2d 466 (5th Cir. 1966), enfg. 147 NLRB 627 (1964), in which the Fifth Circuit upheld the Board's finding that discharge of a supervisor who had adversely testified at a hearing was an 8(a)(1) violation. In that case the Board reasoned that such a discharge did interfere with the Section 7 organizational rights of rank-and-file employees. Although in 1964 the Board held that such a discharge was only an 8(a)(1) violation, today according to *General Services* and *Hi-Craft Clothing Company*, the Board would hold it to be an 8(a)(4) violation. Childers' allegations are similar to the facts in *Oil City Brass*. Although he did not have a chance to testify, he maintains that he was discharged because he was at that hearing for the purpose of testifying. Because such an action implicates the organizational rights of rank-and-file employees, and because he was at the hearing ostensibly to assist in the representation proceedings, the complaint should not be discharged because of Childers' supervisory status. However, as there is no case law to support holding a discharge of a supervisor to be an 8(a)(3) violation, that allegation should be dismissed.

B. *The Unfair Labor Practices Allegations*

Childers, along with the other Park employees, signed a letter seeking representation from the steelworkers union. On February 9, 1981, Childers left work early to go to the doctor because he had the flu and a sinus infection. On February 10, rather than going to work, Childers attended a representation hearing concerning an election at the Park. The case was settled without a hearing. The next time Childers went to work was 2 or 3 days later. On February 20, 1981, Forbes called Childers and the company clerk into his office. During this conversation Forbes discharged Childers. Unknown to Forbes, Childers taped the conversation. The General Counsel introduced a transcript of this recording as an exhibit. Because this transcript is replete with gaps which the transcriber labeled, "unintelligible," I have not relied on it in making my determination. Forbes testified that he fired Childers because he lost confidence in him. Specifically Forbes believed that he was not correcting the other workers properly. Furthermore, Childers turned in job orders that were supposedly complete but which were not. Childers did admit that on several occasions Forbes had criticized his work performance. Finally, Forbes believed that Childers had been stabbing him in the back for several years by criticizing him throughout the town. When Childers was asked by Respondent's counsel about these allegations, his answers were equivocal and he appeared to be less than candid.

The General Counsel has shown that Childers was fired 10 days after attending a representation hearing. However, several of the employees attended this hearing, yet Childers was the only employee fired. The General Counsel's entire showing of union animus consisted of questions from Forbes to Childers about Childers attitude toward the Union. These questions occurred several years earlier. The General Counsel was unable to show any antiunion statements by Forbes between the time Forbes learned of the election petition and the time of Childers' discharge. Thus, I find that the General Counsel was unable to show union animus. Proximity between the discharge and employee attendance at the hearing, without more, is insufficient evidence to warrant finding an 8(a)(4) violation. Therefore, I recommend that the 8(a)(4) allegation be dismissed and that the complaint be dismissed in its entirety.[4]

Upon the foregoing findings of fact and the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act by discharging George Childers.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, as amended, I hereby issue the following recommended:

ORDER[5]

It is hereby recommended that the complaint be, and the same hereby is, dismissed.

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[4] At the end of the hearing, Respondent asked, pursuant to the Equal Access to Justice Act, that his client be granted attorney's fees. On October 1, 1981, 8 days after this request, the Board issued regulations pertaining to this Act. As Respondent's request is premature and does not comport with the required procedure, it is denied. This denial in no way prejudiced a properly executed request.

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.